Supreme Court, U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

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October Term, 1977

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No. 76-1283

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MILTON A. CALESNICK, *Petitioner*

*v.*

UNITED STATES OF AMERICA, *Respondent*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.

Milton A. Calesnick, *Petitioner*

*v.*

United States of America, *Respondent*

## Petition for a Writ of Certiorari to The United States Court of Appeals for the Third Circuit

MILTON A. CALESNICK, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this case on February 18, 1977.

### OPINIONS BELOW

There are no opinions from the Court of Appeals or from the District Court below which are reported.

### JURISDICTION

The judgment of the Court of Appeals below (Appendix A) was entered on February 18, 1977. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a).

### QUESTIONS PRESENTED FOR REVIEW

1. Whether a criminal defendant is deprived of his Fifth Amendment right to remain silent by custodial inter-

rogation by government agents after he has invoked his Miranda rights.

2. Whether the admission into evidence of involuntary statements extracted from a criminal defendant is error requiring a new trial.
3. Whether a criminal defendant is deprived of his Sixth Amendment right to counsel by the violation of an instruction given to government agents by defense counsel that defendant was not to be interrogated and did not intend to answer any questions.
4. Whether a criminal defendant's right to cut off questioning is "scrupulously honored" by government agents in accord with *Michigan v. Mosley*, 423 U.S. 96., when the defendant is not given a fresh set of warnings prior to the questioning which occurs the day following his arrest, his defense counsel is not summoned nor present during said questioning and the questioning was concerning the same criminal episode for which the defendant was initially arrested.
5. Whether a criminal defendant's Fourth Amendment right to privacy from unwarranted governmental intrusions is violated by the actions of government agents who attempt to obtain probable cause for the issuance of a search warrant by means of "peeping" into a window.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment, United States Constitution.

2. The Fifth Amendment, United States Constitution.

3. The Sixth Amendment, United States Constitution.

4. The Statutes under which Petitioner was prosecuted, though nothing turns on their terms, are 21 U.S.C. §841 (a)(1) and 21 U.S.C. §844 (a) which sections provide as follows:



"21 U.S.C. §841 (a) (1) Prohibited Acts A—
Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . ."

"21 U.S.C. §844 Penalty for Simple possession . . .

(a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice. . . ."

5. The Statute under which Petitioner sought appellate review was 28 U.S.C. §1291 which provides as follows:

"1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."

## STATEMENT OF THE CASE

A. *Course of proceedings in the case now before this Court.*

On February 27, 1976, in a cause then pending in the United States District Court for the Eastern District of Pennsylvania, entitled *United States of America v. Milton A. Calesnick*, Criminal No. 75-739-1, petitioner was found guilty by a jury on an indictment of five counts charging violations of 21 U.S.C. §841 (a)(1) and 21 U.S.C. §844(a) for manufacture and possession with intent to deliver a controlled substance, to wit, methaqualone and possession of other controlled substances.

On July 28, 1976, the District Court entered a judgment and commitment order (Appendix B) and petitioner was sentenced to five years imprisonment and two years special parole on counts one and two to run concurrently. Sentence was suspended on counts three through five. The judgment and sentence was affirmed by the United States Court of Appeals for the Third Circuit in *United States of America v. Milton A. Calesnick*, No. 76-2119 in February, 1977 (Appendix A). A motion to stay the mandate of the within matter was filed with the Court of Appeals on March 3, 1977.

B. *Relevant facts concerning the underlying conviction for manufacture and possession with intent to distribute controlled substances.*

Petitioner, a chemist, was arrested after a search and seizure had been made of his two business premises by drug enforcement agents on June 13, 1975. The probable cause stated in one of the search warrants was established by means of an unlawful search of petitioner's premises by an agent who had "peeped" through his window. Petitioner was warned of his *Miranda* rights in the presence of his attorney, Robert M. Pressman. Mr. Pressman immediately



advised the agents that petitioner would not make any statements to them or answer any questions. The following morning, after petitioner had been detained in a police detention cell all night and had been unable to sleep or eat for a twenty-eight hour period, drug agent, Wallace Mignault, violated this instruction of counsel and proceeded to extract damaging statements from petitioner without giving petitioner fresh warnings or summoning counsel.

The damaging admissions were contested at a motion to suppress evidence which was litigated prior to trial. The District Court below concluded (Petitioner's Brief to Court of Appeals at 30) as a finding of fact that said statements were extracted during custodial interrogation. Nevertheless, the damaging admissions were admitted as evidence at trial, over objections by petitioner that they were involuntary and were extracted in violation of his Fifth and Sixth Amendment rights.

## REASONS FOR GRANTING THE WRIT

### I. The Third Circuit Court of Appeals Has Decided a Federal Question in a Way Which Conflicts With Numerous Applicable Decisions of This Court.

This case involves the involuntary extraction of incriminating statements during custodial interrogation of petitioner after he had invoked his Fifth Amendment right to remain silent and his Sixth Amendment right to assistance of counsel.

(a) *Violation of petitioner's Fifth Amendment rights.*

The statements were extracted from petitioner after the arresting officers had been advised by defense counsel and petitioner that petitioner was not to be questioned. Nevertheless, the agent in charge of the investigation in the case, did question and interrogate petitioner the day

following petitioner's arrest without the presence of counsel. The agent thereby violated the specific instruction which had been made to him by petitioner's attorney. The petitioner's alleged answers to the agent's questions were that he had tried to make methaqualone but was not successful and that he did not need a specific ingredient to make the drug because he used a large heat reactor in its place. Since petitioner had been charged with the manufacture and possession with intent to deliver methaqualone, the statements extracted from petitioner were certainly harmful and were a direct link in the chain of evidence used to convict. The statements certainly fall within the protection of the Fifth Amendment even if they do not constitute an express confession or admission of all of the elements of the crimes charged. *Harrison v. United States*, 392 U.S. 219; *Malloy v. Hogan*, 378 U.S. 1; *Murphy v. Waterfront Commissioners*, 378 U.S. 52.

The evidence extracted from petitioner was clearly contrary to the specific pronouncements of *Miranda v. Arizona*, 384 U.S. 436. It is also settled that the truth of incriminating statements does not remove them from the protection of the Fifth Amendment for "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or part, upon an involuntary confession without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction." *Jackson v. Denno*, 378 U.S. 468, 376.

(b) *Violation of Sixth Amendment.*

The petitioner's Sixth Amendment right to counsel was violated by the questioning of the drug enforcement agent after the agent had been instructed that petitioner not be interrogated and would not answer any questions. Such questioning, without the protection afforded by the



presence of counsel, contravenes the basic dictates of fairness and the fundamental rights of persons charged with crime. *Massiah v. United States*, 377 U.S. 201.

In light of the circumstances of the case, petitioner could not effectively have waived his right to counsel for purposes of interrogation in the absence of counsel. To hold otherwise would make it impossible for defense counsel fully to protect his client's rights without staying with him the entire time the client is detained by the authorities. *Brewer v. Williams*, 509 F.2d 227 (8th Cir. 1975) *cert. granted*, 423 U.S. 1031.

(c) *Petitioner's right to cut off questioning was not scrupulously honored.*

Inasmuch that the interrogation was conducted nineteen hours after petitioner's rights had been invoked and no new fresh warnings were given to petitioner prior to the renewal questioning, a heavy burden was thrust upon the government to show that petitioner's right to cut off questioning had been "scrupulously honored." *Michigan v. Mosley*, 423 U.S. 96. This Court recently indicated in *Mosley* that when the defendant was (1) readvised of his rights prior to the renewed questioning by a (2) different officer as to a (3) different crime, statements then obtained were not in violation of that defendant's rights. In the instant case, the Government concedes in its brief to the Third Circuit (at 30) that no fresh *Miranda* warnings were given, petitioner's attorney was not present and the questions by the same officer were designed to elicit responses related to the instant case. Clearly, the Government has not met the heavy burden imposed upon it by *Mosley* to show that petitioner's right to cut off questioning had been "scrupulously honored."

## II. The Court of Appeals Has Decided Important Questions of Federal Law in a Way Which Conflicts With Other Federal Circuit Courts.

The petitioner respectfully urges that the decision of the circuit court below is erroneous and at variance with the decisions of other circuit courts in the following respects:

(a) *Conflict in federal law on legality of visual searches by government agents.*

The conduct of the drug enforcement agent in standing in front of petitioner's property and "peeping" in his window was clearly in contravention of petitioner's Fourth Amendment right to be free from unreasonable searches and seizures. It is well settled that the Fourth Amendment embodies a comprehensive right of privacy against unwarranted governmental intrusions. In the instant case, the agent's conduct constituted an illegal search because his trip to petitioner's window occurred at a time when he lacked probable cause to believe that any crime had or was occurring thereon. Contrary to the view of the lower circuit court, the Fifth Circuit has continually stated that an eye can commit a trespass. *Brock v. United States*, 223 F.2d 681 (5th Cir. 1955); *Texas v. Gonzales*, 388 F.2d 145 (5th Cir. 1968). Those cases have held that an actual intrusion can be accomplished visually. Furthermore, the Government cannot rely on the "plain view doctrine" because that exception does not apply where the observing officer has physically invaded a constitutionally protected area in order to secure the view. *United States v. Davis*, 423 F.2d 974 (5th Cir. 1970).

In the instant case, the initial intrusion which brought the agent into the view of alleged contraband was not lawful. The agent subsequently received a search warrant based upon his illegal observations. A police search in contravention of a constitutional guarantee is not made



lawful by what it brings to light. The search must be good or bad when it starts and does not change character from its success or failure. *United States ex. rel. McArthur v. Rundle*, 402 F.2d 701 (3rd Cir. 1968).

The Fifth Circuit, unlike the Third Circuit below, would not have affirmed the conviction of the petitioner upon evidence discovered by a visual trespass.

The petitioner therefore believes that the decision in his case is erroneous and at variance with the decisions of the Fifth Circuit. The conflict in federal law should be resolved by this Court.

(b) *Conflict in federal law on whether petitioner was denied the assistance of counsel.*

The precise issue upon which petitioner seeks review by this Court has been determined in his favor by numerous federal circuit courts. Thus, a conflict in federal law exists and sound judicial discretion dictates that the issue be finally settled by this Court.

The Second, Fifth and Eighth Circuits have all held, contrary to the decision in this case, that a defendant is denied the Sixth Amendment right to the assistance of counsel when defense counsel has advised both his client and the authorities that no further interrogation was to be conducted and the authorities nevertheless extract incriminating evidence by questioning the defendant. See *Magoon v. Reincke*, 416 F.2d 69 (2nd Cir. 1969); *United States v. Wedra*, 343 F. Supp. 1183 (S.D. N.Y. 1972); *Taylor v. Elliot*, 458 F.2d 979 (5th Cir. 1972), and *Brewer v. Williams*, 509 F.2d 227 (8th Cir. 1975), *cert. granted*, 423 U.S. 1031.

*Brewer v. Williams, supra*, is presently before this Court for review. The same important constitutional considerations which this Court must resolve in *Brewer v. Williams, supra*, are at issue in the instant appeal. This Court should grant certiorari in order to simultaneously decide the meritorious issues which these two cases present.

## CONCLUSION

The judgment below represents a departure from the fundamental decisions of this Court which have required that convictions which are based in any manner upon involuntary confessions be set aside. As such, this case represents a breach of the Fifth Amendment right to remain silent and the Sixth Amendment right to the assistance of counsel. The judgment below is also contrary to numerous decisions of this Court and other federal circuit courts, which decisions were designed to protect citizens from improper or overzealous behavior by government agents. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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## APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2119

UNITED STATES OF AMERICA

*v.*

MILTON A. CALESNICK, *Appellant*

(Criminal No. 75-739-1, E. D. of Pa.)

Submitted Under Third Circuit Rule 12(6)
February 17, 1977

Before SEITZ, *Chief Judge*,
Van Dusen and Weis, *Circuit Judges*.

**Judgment Order**

After consideration of all the issues raised by appellant, to-wit:

(1) Was the evidence adduced at trial sufficient beyond a reasonable doubt to have convicted defendant?

(2) Should a new trial be granted to defendant in that the government's attorney continuously used inflammatory and improper dialogue in both his opening and closing statements to the jury and at trial?

(3) Did the court err in allowing the government prosecutor to cross-examine defendant's character witnesses about an alleged arrest of defendant for perjury and other crimes of falsehood?

(4) Were the defendant's Fourth Amendment rights infringed by the issuance of search warrant without probable cause and by unreasonable and illegal searches and seizure by government agents?

(5) Were the Defendant's Fourth Amendment rights infringed by the forced entry by government agents without notice and by the initiation of searches without having given the defendant copies of the warrants at the time of entry over his objection and demand?

(6) Did the court err in allowing statements of defendant into evidence which had been extracted during custodial interrogation after defendant had chosen to exercise his Fifth Amendment right to remain silent and his Sixth Amendment right to counsel?

IT IS ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

/s/
*Chief Judge*

Attest:

/s/ THOMAS F. QUINN
*Clerk*

Dated: February 18, 1977



## APPENDIX "B"

[Caption Omitted in Printing]

### JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, July 28, 1976.

☐ **Without Counsel.**

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ **With Counsel** (Name of Counsel). Robert M. Pressman, Esq.

☐ **Guilty,** and the court being satisfied that there is a factual basis for the plea,

☐ **Nolo Contendere,**

☒ **Not Guilty.**

There being a finding/verdict of

☐ **Not Guilty.** Defendant is discharged.

☒ **Guilty.**

Defendant has been convicted as charged of the offense(s) of: manufacture of Schedule II controlled substance [21 U.S.C. §841(a)(1)] on Count I; possession of Schedule II controlled substance [21 U.S.C. §844(a)] on Counts II, III, IV and V;

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years to be followed by Special Parole for a period of Two (2) Years, pursuant to 18 U.S.C. §4205(a) on Count I. On Count II, the defendant is committed to

the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years to be followed by Special Parole for a period of Two (2) Years, pursuant to 18 U.S.C. §4205(a); said period of imprisonment and Special Parole to run concurrently with the sentence imposed on Count I above. On each of Counts III, IV and V, the imposition of sentence is suspended.

It is further ordered that the execution of the sentence is STAYED pending appeal.

* * *

Signed by

☒ U.S. District Judge

☐ U.S. Magistrate

Joseph L. McGlynn, Jr.

Certified as a true copy on
this date 7/28/76
By B. Bearman

☐ Clerk

☒ Deputy